

D.P.U. 91-DS-3

Adjudicatory hearing in the matter of a possible violation of General Laws Chapter 82, Section 40, by J.B. D'Allessandro Corporation.

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APPEARANCES: Russell Corner, Vice President  
J.B. D'Allessandro Corp.  
25 Bryant Avenue  
Milton, Massachusetts 02186  
FOR: J.B. D'Allessandro Corp.  
Respondent

Henry Cappuccio, Utility Engineer  
Division of Pipeline Engineering and Safety  
Department of Public Utilities  
Boston, Massachusetts 02202  
FOR: THE DIVISION OF PIPELINE  
ENGINEERING AND SAFETY

## I. INTRODUCTION

On May 1, 1991, the Division of Pipeline Engineering and Safety ("Division") of the Department of Public Utilities ("Department") issued a Notice of Probable Violation ("NOPV") to J.B. D'Allessandro Corporation ("Respondent"). The NOPV stated that the Division had reason to believe that the Respondent performed excavations on April 2, 1991 on Burgett Avenue, Medford, in violation of G.L. c. 82, § 40 ("Dig-Safe Law"). The Respondent allegedly failed to exercise reasonable precautions, causing damage to an underground service line by Boston Gas Company ("Boston Gas" or "Company"). The NOPV also stated that the Respondent had the right to either appear before a Department hearing officer in an informal conference on June 11, 1991, or send a written reply to the Department by that date.

On May 6, 1991, the Respondent replied by letter, stating that it had obtained a valid Dig-Safe number and not violated the Dig-Safe Law. In a letter dated May 30, 1991, the Division informed the Respondent of its determination that the Respondent had violated the Dig-Safe Law and informed the Respondent of its right to request an adjudicatory hearing.

On June 7, 1991, the Respondent contacted the Division to request a copy of the underground damage report submitted by Boston Gas. On June 18, 1991, the Division sent the Respondent copies of all relevant documents submitted by the Company, and informed the Respondent that it had one week in which to request an adjudicatory hearing. On July 18, 1991, the Respondent requested an adjudicatory hearing pursuant to 220 C.M.R. § 99.07(3). After due notice, an adjudicatory hearing was held on April 28, 1992 pursuant to the Department's procedures for enforcement under 220 C.M.R. § 99.00 et seq.

At the hearing, Henry Cappuccio, a utility engineer for the Division, appeared on behalf of the Division. Ernest Grasso, a district supervisor for the Boston Gas, testified in behalf of the Division. Russell Corner, a vice-president for the Respondent, testified for the Respondent. All exhibits offered were moved into evidence by the Department.

## II. SUMMARY OF FACTS

### A. The Division's Position

The underground damage report offered by the Division indicates that the Respondent damaged a Company service line at 32 Burgett Avenue in Medford (Exh. D-1). The Division alleged that the Respondent failed to use reasonable precautions to prevent damage to underground facilities while excavating (Tr. at 5-6, 20). With respect to this allegation, the Division asserted that the Respondent should have used hand-digging to determine the location of the Company's service line before excavation instead of using an excavating machine (id. at 11-12, 20).

Mr. Grasso testified that he had visited the site shortly after the damage occurred and found that the markings were clearly visible (id. at 9-10, 14). Mr. Grasso also testified that the condition of the site indicated that the excavation had been performed by a machine, and not by hand (id. at 10, 14). Mr. Grasso stated that although the digging conditions at the site were poor, hand-digging was still possible and should have been used to expose the underground facilities (id. at 10-11, 13). He also stated that damage could have been avoided if the Respondent had used hand-digging to expose underground facilities instead of excavating by machine (id. at 10-11).

### B. The Respondent's Position

Mr. Corner testified that although he did not witness the damage, he was on the site during the damage and quickly contacted the Company to report it (id. at 19, 27). Mr. Corner stated that the Company's service was lodged against a boulder (id. at 15-16, 19). He also stated that the damaged occurred when the Respondent removed the boulder with an excavating machine (id. at 16, 28). He further stated that the Respondent normally strips off the top foot of asphalt and macadam to enable it to locate underground facilities by hand, except in cases when it encounters boulders, as in the instant case (id. at 18-19).<sup>1</sup> He asserted that the boulder and other unforeseen subsurface conditions hampered the Respondent's attempts to locate the line, and that the Respondent was not negligence or careless (id. at 16, 32).

### III. STANDARD OF REVIEW

G.L. c. 82, § 40 states in pertinent part:

Any such excavation shall be performed in such manner, and such reasonable precautions taken to avoid damage to the pipes, mains, wires or conduits in use under the surface of said public way...including, but not limited to, any substantial weakening or structural or lateral support of such pipe, main, wire, or conduit, penetration or destruction of any pipe, main, wire or the protective coating thereof, or the severance of any pipe, main or conduit.

"Reasonable precautions" is not defined in the statute or the Department's regulations, nor do regulations specify approved conduct. Instead, case precedent has guided the Department in this area. Several recent cases have established the proposition that using a machine to expose utilities, rather than hand-digging, constitutes a failure to exercise reasonable precautions. See Cairns & Sons, Inc., D.P.U. 89-DS-15 (1990); Petricca Construction Company, D.P.U. 88-DS-31

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<sup>1</sup> Mr. Corner later admitted that he was not sure whether the Respondent located the service by hand before it removed the boulder (Tr. at 28).

(1990); John Mahoney Construction Co., D.P.U. 88-DS-45 (1990); Northern Foundations, Inc., D.P.U. 87-DS-54 (1990). However in Fed. Corp., hand-digging to locate facilities was found to be impossible, and use of a Gradall was found to be reasonable when the Division failed to set forth a reasonable alternative the excavator could have taken to avoid damage. Fed. Corp., D.P.U. 91-DS-2 (1992).

A variation in depth does not relieve an excavator from the duty to use reasonable precautions. Fed Corp, *supra*; Amorello, D.P.U. 89-DS-61 (1990). However, the depth of an underground facility may be relevant in certain cases when that depth may have limited the precautions an excavator could have taken to protect underground facilities. Amorello & Sons, D.P.U. 87-DS-148, at 7-8 (1993); New England Excavating, D.P.U. 89-DS-116, at 6-7 (1993).

In order for the Department to justly construct a case against an alleged violator of the Dig-Safe Law for a failure to exercise reasonable precaution, adequate support or evidence must accompany that allegation. New England Excavating, *supra*, at 9; Fed. Corp., *supra*, at 5-6. In specific instances where there has been an allegation of a failure to exercise reasonable precaution without demonstrations of precautions the excavator could or should have taken, the Department has found that the mere fact of damage will not be sufficient to constitute a violation of the statute. Umbro & Sons, D.P.U. 91-DS-4 (1992); Fed. Corp, *supra*; Albanese Brothers, Inc., D.P.U. 88-DS-7 (1990).

### III. ANALYSIS AND FINDINGS

The issue to be decided in this case is whether the excavator failed to exercise reasonable precautions during excavation.

The Division alleged that the Respondent failed to use reasonable precautions by using an excavating machine to locate the damaged facility, and that this action caused damage to that facility. The Respondent did not controvert this testimony with adequate evidence, or provide adequate evidence that it had hand-dug to locate the Company's service line before it damaged that facility with an excavating machine.

In specific instances where there has been an allegation without demonstrating further precautions that could or should have been taken, the Department has found that the mere fact of damage will not be sufficient to constitute a violation of the statute. Fed. Corp., supra; Albanese Brothers, Inc. v. Colonial Gas Company, D.P.U. 88-DS-7 (1990). Adequate support or evidence must accompany any allegation that an excavator failed to exercise reasonable precautions in order for the Department to justly construct a case against the alleged violator. Fed. Corp., supra.

In the instant case, the Division adequately demonstrated that the Respondent failed to exercise reasonable precautions when the Respondent failed to hand-dig to locate the underground facilities prior to excavation. The Respondent did not adequately refute the Division's evidence. Accordingly, the Department finds that the Respondent failed to exercise reasonable precautions when excavating on April 2, 1991 on Burgett Avenue, Medford, Massachusetts, and violated the Dig-Safe Law.

#### IV. ORDER

Accordingly, after due notice, hearing, and consideration, the Department

FINDS: That J.B. D'Allessandro Corporation, violated the Dig-Safe Law when it failed to exercise reasonable precautions while excavating on April 2, 1991 on Burgett Avenue, Medford,

Massachusetts; and it is

ORDERED: That J.B. D'Allessandro Corporation shall pay a civil penalty of \$200 to the Commonwealth of Massachusetts by submitting a check or money order in that amount to the Secretary of the Department of Public Utilities, payable to the Commonwealth of Massachusetts, within 30 days of the date of this order.

By Order of the Department,